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In The

Supreme Court of the United States

October Term, 1995

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ISLAY INVESTMENTS, a California Partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

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QUESTIONS PRESENTED

1. Whether petitioners, named class representatives, have standing to assert the claims of absent class members with respect to equitable offsets where (a) class counsel has refused to represent absent class members with respect to offsets, and (b) the class representatives will be bound, regardless of the effect of the judgment on absent members.

2. Whether this case presents a controversy appropriate for adjudication by this Court where (a) the State Court has not ruled on the federal questions presented, (b) petitioners are plainly seeking an advisory opinion, (c) petitioners' remedies will be preserved (both in the State Court and in this Court) if their due process concerns are not met on remand.

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Islay Investments, a California Partnership, and Marvin Trevillian, respectfully submit this opposition to the petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

California Civil Code Section 1950.5 (as eff. 1985) provides, in pertinent part:

> "(e) The landlord may claim of the security only such amounts as are reasonably necessary to [the purposes for which the security could be used were previously listed here]. No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant. . . .
>
> "(h) The bad faith claim or retention by the landlord . . . of a security or any portion thereof in violation of this section, may subject the landlord . . . to damages not to exceed two hundred dollars ($200), in addition to any actual damages. In any action under this section, the landlord shall have the burden of proof as to the reasonableness of the amounts claimed."

California Code of Civil Procedure Section 431.70 provides:

> "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by

one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. . . . ."

SUMMARY OF ARGUMENTS

The class representatives have no standing to assert the issues presented by the Petition because their counsel has refused to represent absent class members with respect to offsets. The class representatives will be bound regardless of the effect of the judgment on absent class members. *Zablocki v. Redhail* (1978) 434 U.S. 374.

This case does not present a controversy appropriate for adjudication by this Court because **the State Court did not authorize the trial court to adjudicate the offsets without notice to the absent class members.** The State Court remanded the case to the trial court for the adjudication of offsets, and properly directed the trial court to fashion a remedy which will avoid the practical problems about which petitioners complain. In shaping that remedy, the trial court will follow the guidance of federal courts in class action cases. **Further notice is essential** – particularly because petitioners' counsel has refused to represent the absent class members with respect to offsets.

"Actual notice" is not required. The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865; 70 S.Ct. 652]. In class actions, publication and mailing to all class members whose addresses can be ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156 [40 L.Ed.2d 732 at pp. 746-747; 94 S.Ct. 2140], citing *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. 306, 314.

The State Court did not hold that the class action notice was a "substitute" for the "itemized statement" required by Civil Code section 1950.5. The State Court expressly held that because respondents did not comply with section 1950.5, respondents could not take advantage of the summary "deduct and retain" procedures of that statute. However, the State Court held that the loss of the right to utilize the summary proceeding did not mean that respondents lost all right to claim damages for unpaid rent, repair and cleaning, through setoff or otherwise (Code of Civ. Proc. sec. 431.70) (App. 8).

If petitioners' due process concerns are not met on remand, their right to present the federal constitutional questions which they set forth in the Petition will be preserved, both in the State Court and in this Court. Therefore, there is no reason to grant the writ.

STATEMENT OF THE CASE

This action was filed in April of 1981, when the class sued respondents for the return of sums paid as rent in the course of a rent discount program. When the program was in effect, respondents did not provide the itemized statement when the tenants vacated (sec. 1950.5) because respondents did not believe they held any "security." Instead, respondents treated the money as rent for all purposes and bore all costs of cleaning and repair. The class representatives and other tenants confirmed at trial that they did not expect to receive any money when they moved because they did not believe they had paid a security.[1]

Despite these facts, class counsel claimed that a portion of the first months' rent constituted "security" within the meaning of Civil Code section 1950.5. The complaint (and three subsequent amendments thereto) acknowledged that if the money at issue were found to be security, respondents would be entitled to claim offsets (see, e.g., JA, v. 1, 1, 20). Offsets were also pleaded as an affirmative defense in respondents' answer (JA 1484).

In 1982, the trial court granted respondents summary judgment, holding that the "first month's rental charged by [respondents] was 'rent' in fact as well as in name." In *Granberry v. Islay Investments* (1984) 161 Cal.App.3d 712, the appellate court reversed, noting the "unintelligibility"

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[1] Each of the named plaintiffs confirmed that they had no complaints about the rent discount program until they were solicited by counsel to become involved in this case.

of section 1950.5,[2] but avoiding a finding of overbreadth by holding that the character of the funds (i.e., rent vs. security) was a question of fact (*Granberry v. Islay Investments, supra,* 161 Cal.App.3d at p. 392).[3]

On remand, the trial court permitted respondents to amend their answer and file a cross-complaint to assert offsets. During those proceedings, plaintiffs' counsel admitted:

> "This Court can determine the viability of such set off claims in the context of the class action, and, should the court find that some of those setoff claims can be asserted and are viable, devise an appropriate method to resolve the individual fact issues relevant to a determination of the amount, if any, owed by Islay to each individual absent class member." (JA v. 10, pp. 2397-2398.)

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[2] Section 1950.5 defines "security" as: "(b) . . . **any payment**, fee, deposit or charge, including, but not limited to, an advance payment of rent, **used or to be used for any purpose**, including, but not limited to, any of the following: (1) The compensation of a landlord for a tenant's default in the payment of rent. (2) The repair of damages to the premises caused by the tenant or by a guest of licensee of the tenant. (3) The cleaning of the premises upon termination of the tenancy" (emphasis added).

[3] In light of this Opinion, it would have been futile for respondents to appeal the jury's finding that the money in question was "security." At least two California appellate courts have upheld section 1950.5, pleading in the process for legislative clarification. *Granberry v. Islay Investments, supra,* 161 Cal.App.3d 382, at p. 388 and *People ex rel. Smith v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 694 (King, J., concurring).

In December of 1987, petitioners' counsel mailed the class notice to each class member for whom they had an address. The notice was also published in the Santa Barbara News Press, a newspaper of general circulation. The notice advised absent class members:

> " . . . that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive. . . .
>
> . . .
>
> "If you are a member of the above described class of persons and do not submit a written request to be excluded you will be represented by [petitioners'] counsel and will be bound by any judgment in the action whether it be favorable or unfavorable."

However, as the litigation progressed, petitioners' counsel claimed that while they **did** represent absent class members with respect to claims against respondents, counsel **did not** represent absent class members with respect to the offsets (JA, v. 10, 2317).[4] Because counsel refused to represent absent class members with respect to

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[4] When respondents served petitioners' counsel with Doe amendments to the cross-complaint already on file against the named class members (each of which asserted the specific claims for each absent class member's failure to pay rent and for cleaning and damage repair (JA, v. 9, 2286)), petitioners' counsel quashed service on the ground that they did not represent the absent class members with respect to respondents' claims for offset (JA, v. 10, 2317).

the offsets, petitioners have no standing in this Court (see Arg. I, *infra*).

During pre-trial proceedings, the parties conducted extensive discovery about the offsets. At one point, the appellate court intervened and required respondents to provide the factual basis for each offset (2d Civ. Nos. B036953 and B036956). Respondents did so, at great cost (JA, v. 13, 3331). The itemizations of offsets and the supporting documents were made available to petitioners by way of an extensive document production (Exhs. 278-280).

When petitioners realized that respondents' offsets were *bona fide*, they sought relief from their earlier admission that respondents were entitled to claim them. They also moved for summary adjudication, claiming that respondents' offsets were barred for failure to provide accountings of the disposition of the security within two weeks after the tenants vacated (sec. 1950.5, subd. (f)). The trial court granted petitioners' motion and struck respondents' affirmative defense of offset.

The matter proceeded to trial. The jury was provided a copy of the entire text of section 1950.5, but was not informed that the trial court had forfeited respondents' offsets. Despite uncontroverted evidence that the rent discount program was a sound and successful marketing program (designed to lengthen the term of tenancies), and despite any lack of correlation between the industry average security deposit and the amount of the rent discount, and despite the class representatives' testimony (and that of other tenants) that they were not misled in

any way, the jury found the sum in question to be "security" within the meaning of section 1950.5.[5]

Shortly after the jury's verdict, respondents completed the itemized statements with respect to both the rent discount and the offsets for each tenancy (RT, v. VI, 1604-1605) and the case proceeded through an accounting phase. The accounting itself consists of a 1339-page computer printout listing the rent discount for each class member and each statutory offset (Exhs. 278-280). Other than a discrepancy as to the number of tenancies, petitioners' counsel stated they had no objection to the information which had been provided by respondents, and respondents' accounting was received into evidence.

The trial court entered judgment, and both parties appealed. In *Granberry v. Islay Investments* (2d Civ. No. B057796), the appellate court reversed the forfeiture of respondents' right to offset.[6] The California Supreme

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[5] The jury deliberated the issue of "rent" v. "security" for four days; the vote was 9 to 3 in petitioners' favor. The same jury decided in 2 hours that respondents had not acted in "bad faith."

[6] Petitioners' statements concerning automatic escheat of the unclaimed security (Pet., p. 15, fn. 7) and referring to the Controller as the "successor in interest" to the absent class members (Pet., p. 23) are incorrect. Reversion of the unclaimed class residue is an appropriate remedy in a proper case. *Van Gemert v. Boeing* (2d Cir. 1984) 739 F.2d 730; *Wilson v. Southwest Airlines, Inc.* (5th Cir. 1989) 880 F.2d 807. The appellate court affirmed that part of the judgment by which the trial court found that respondents were entitled to retain the unclaimed residue. The California Supreme Court did not hold that the residue would automatically escheat. Instead, the Court simply directed the trial court to reconsider that issue after it had litigated the question of offsets (App. 19).

Court granted review, and the majority affirmed respondents' right to claim equitable offsets, subject to equitable defenses (App. 16).

Petitioners' characterization of the State Court's Opinion is seriously flawed. **The State Court did not authorize the trial court to adjudicate** respondents' offsets without further notice to absent class members. That issue was not before the Court. Instead, petitioners argued that respondents should not be allowed **to claim** offsets because (a) the class notice was not sufficient to apprise absent class members that offsets were at issue, and (b) respondents had originally claimed that the money was rent (App. 14). That is the context in which the State Court rejected petitioners' arguments regarding estoppel and lack of notice (cf. Pet., p. 11).

More importantly, in response to petitioners' assertion that respondents should not be entitled **to claim** offsets because of the practical difficulties inherent in the process, the Court held that respondents' rights should not be sacrificed simply because petitioners chose to proceed by way of class action:

> "First, **it may well be possible on remand to shape a remedy that will avoid many of the problems [petitioners] have identified.** Second, it is inappropriate to deprive [respondents] of their substantive rights merely because those rights are inconvenient in light of the litigation posture [petitioners] have chosen. (see *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462, fn. omitted ['Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with

the ends – to sacrifice the goal for the going.'].)" (App. 15-16.)

This holding is not reasonably susceptible to the interpretation seized on by petitioners in their attempt to create an issue for this Court's review. The State Court simply confirmed respondents' **right to claim** offsets; the Court did not purport to direct the manner in which those offsets would be **adjudicated**.[7] There is well settled authority to guide the trial court in shaping a procedure by which to adjudicate offsets (including further notice to the class). Unless and until that procedure infringes upon the due process rights of absent class members, this case will not present a controversy appropriate for adjudication by this Court.

REASONS TO DENY THE WRIT

I

THE NAMED CLASS REPRESENTATIVES HAVE NO STANDING.

Federal standing "requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 805 [86 L.Ed.2d 628; 105 S.Ct. 2965]. That situation is not present

[7] Except to require an evidentiary hearing at which, among other things, petitioners will be entitled to assert equitable defenses (App. 16).

in this case because petitioners' counsel claimed throughout the state court proceedings that he **did not** represent the absent class members with respect to offsets.[8]

Moreover, the named class members, against each of whom respondents claim offsets, will be bound regardless of the effect of the judgment on absent class members. *Zablocki v. Redhail* (1978) 434 U.S. 374. Under those circumstances, "the absent class members must be content to assert their due process rights for themselves, through collateral attack or otherwise." *Id.*, 434 U.S. at p. 380, fn. 6.

II

PETITIONERS ARE SEEKING AN ADVISORY OPINION. THE CALIFORNIA COURTS WILL NOT ADJUDICATE RESPONDENTS' OFFSETS WITHOUT PROVIDING FURTHER NOTICE TO THE CLASS. THEREFORE, THE QUESTION OF WHETHER SUCH NOTICE (AND THE PROCEEDINGS AFTER REMAND) SATISFIES DUE PROCESS DOES NOT PRESENT A CONTROVERSY APPROPRIATE FOR ADJUDICATION BY THIS COURT.

The State Court determined only respondents' **right to claim** offsets. **The State Court did not direct the trial court to "adjudicate" offsets without further notice to the absent class members.** Therefore, the first issue framed by petitioners is not properly before this Court.

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[8] Cf. Pet., p. 17, where counsel now claims that he **does** represent the absent class members.

The State Court remanded the case to the trial court with directions to adjudicate the offsets and properly delegated to the trial court the duty to "shape a remedy" to avoid the practical problems identified by petitioners. In shaping that remedy, the trial court will follow federal class action guidelines with respect to notice to absent class members.[9] Petitioners are not entitled to review based on their speculation that the trial court will not follow federal guidelines. In fact, further notice to the absent class members (i.e., the "best notice practicable") is essential in this case **because, contrary to the original notice, petitioners' counsel has now refused to represent them with respect to offsets.**

Under these circumstances, it is plain that this case is not ripe for review because the federal courts "do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual bases, not abstractions, are requisite." *United Public Workers v. Mitchell* (1947) 330 U.S. 75, 89 [67 S.Ct. 556]; *Communist Party of U.S. v. Sub. Act. Cont. Bd.* (1961) 367 U.S. 1, 71 [81 S.Ct. 1357].

> "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function

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[9] California courts look to federal case law for guidance in class actions (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 709), particularly where due process issues are presented (*Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 242-244).

> [and does not present] a controversy appropriate for adjudication."
>
> *International Longshoremen's and Warehousemen's Union v. Boyd* (1954) 347 U.S. 222, 223-224 [74 S.Ct. 447].[10]

For the same reason, petitioners' request that this Court remand to the State Court with directions to rule on the issue of future notice to the class is also inappropriate because such a remand would require the State Court to render an impermissible "advisory" opinion (see, e.g., *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170; Cal. Const., Art. VI, sec. 11).

III

"ACTUAL NOTICE" IS NOT REQUIRED IN ANY EVENT.

Petitioners anticipated the "ripeness" objection by asserting that, even if further notice is given to the class,

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[10] Petitioners' reliance on *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 [95 S.Ct. 1029; 43 L.Ed.2d 328] is misplaced. In *Cox*, the state court had actually decided the federal question. Moreover, the categories delineated in *Cox*, where review is appropriate even though the case has been remanded for further proceeedings, involve situations where "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date" (*Id.*, 420 U.S. at p. 478). In this case, the federal question will not arise until remand and, even then, petitioners' due process concerns may be satisfied.

offsets should be denied because "actual notice" cannot be given (Pet., p. 16).[11] **"Actual notice" is not required.**

The original class notice, which the State Court found sufficient to apprise absent class members that offsets were at issue, was mailed to each class member whose address was ascertainable. The notice was also published in a newspaper of general circulation. Similar notice will be given after remand; this further notice will also be sufficient under this Court's guidelines for class actions.

Contrary to petitioners' contentions, this Court has never required "actual notice" prior to deprivation of property through state auspices (Pet., p. 17). The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 314. In class actions, publication and mailing to all class members whose addresses can be

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[11] There is no evidence to support petitioners' claim that "it is no longer possible to give due process notice to any, or at the least, the vast majority of class members at this late date" (Pet., p. 23). In fact, petitioners have misstated the percentages. On page 7, petitioners acknowledge that of the 5,438 notices mailed, only 1756 were returned. That means that **68% of the notices were actually received by class members** (cf. Pet., p. 16, fn. 8, where petitioners state that the notices reached only a third of the absent class members). Moreover, petitioners have entirely omitted from their calculations those class members who received notice through publication.

ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, citing *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 314; see, also, *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, 348 [57 L.Ed.2d 253; 98 S.Ct. 2380]; *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812-813 [86 L.Ed.2d 628; 105 S.Ct. 2965].

None of the cases cited by petitioners would require "actual notice" to absent class members in this case. In *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 317-318, this Court specifically held that published notice was constitutionally sufficient for beneficiaries whose interests or whose whereabouts could not be ascertained. In *Mennonite Bd. v. Missions v. Adams* (1983) 462 U.S. 791 [77 L.Ed.2d 180; 103 S.Ct. 2706] and *Tulsa Collection Services v. Pope* (1988) 485 U.S. 470, 490 [99 L.Ed.2d 565; 108 S.Ct. 1340], this Court held published notice insufficient only because the names and addresses of parties were known or reasonably capable of ascertainment.

Petitioners' speculative complaints (Pet., pp. 19-20) are entirely unwarranted. Respondents' rights cannot be forfeited simply because petitioners chose the class action vehicle in which to litigate their complaints and unnecessarily prolonged the proceedings by unremitting appeals.[12] After remand, the absent class members will be

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[12] As the State Court noted, delay prejudices the landlord, who loses the opportunity to take advantage of the summary deduct and retain procedure, and must "instead prove in court by a preponderance of the evidence that he is entitled to damages and that the amount claimed is reasonable. (Sec. 1950.5,

given notice of the details of respondents' claims and will be given an opportunity to appear and object if they wish, consistent with the requirements of *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156. Whether the notice which will be provided to the class after remand offers the absent members a "reasonable" choice cannot be determined because the notice has not yet been formulated in the trial court.

IV

THE STATE COURT DID NOT HOLD THAT THE CLASS NOTICE SUBSTITUTED FOR THE STATUTORY REQUIREMENT OF A TIMELY "ITEMIZED STATEMENT" (CIV. CODE SEC. 1950.5). THE STATE COURT HELD THAT RESPONDENTS' GOOD FAITH FAILURE TO COMPLY WITH CIVIL CODE SECTION 1950.5 DID NOT BAR RESPONDENTS' CLAIM TO EQUITABLE OFFSETS (CODE OF CIV. PROC. SEC. 431.70).

Petitioners' assertion that the state court "substituted" the class notice for the "notice" required by section 1950.5 (Pet., 14-15 and fn. 6) is faulty in several critical respects. First, Civil Code section 1950.5 does not require "notice" – the statute simply requires an "itemized statement" of the security and its disposition (sec. 1950.5, subd. (e)). The Legislature did not require

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subd. (k).) This burden of proof will become ever more difficult to sustain the longer the landlord delays, because the evidence supporting his claim may be lost with the passage of time." (App. 14.)

due process notice with respect to the itemized statement. Instead, the Legislature anticipated that litigation may be necessary to enforce the parties' rights – litigation in which the due process rights of all parties would be protected.[13]

More importantly, **the State Court did not hold that the class notice "substituted" for the itemized statement required by section 1950.5** (Cf. Pet., pp. 14-15 and fn. 6). To the contrary, the State Court expressly found that respondents **had not complied** with section 1950.5 and thus could not avail themselves of the "deduct and retain" procedure set forth in section 1950.5 (App. 5-10).

The heart of the State Court's opinion, which petitioners have entirely ignored, is the Court's conclusion that equitable offsets should not be automatically denied every landlord who does not comply with the statutory provisions (sec. 1950.5). To reach that result, the State Court utilized principles well settled in this Court.

First, as this Court has held, "forfeiture remedies and penalties are the subject of historic disfavor in our country." *Alexander v. United States* (1993) 509 U.S. ___ [125 L.Ed.2d 411, 458]. Therefore, the State Court construed section 1950.5 to avoid forfeiture, analyzing whether the allowance of equitable offsets would be consistent with the legislative intent underlying section 1950.5 (App., pp. 7-10). The State Court found equitable offsets consistent

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[13] And, to even the playing field, the Legislature expressly provided that, in the event of such litigation, the landlord bears the burden of proof as to the reasonableness of the offsets (sec. 1950.5, subd. (h) now (k)).

with the legislative intent because (a) there was no indication that the Legislature intended forfeiture for failure to timely provide the itemized statement, and (b) forfeiture of offsets would imply a penalty not provided by the Legislature – a penalty which would punish landlords who acted in good faith (App., p. 12).[14]

Respondents' good faith misinterpretation of the statute was graphically demonstrated by the aggregate losses respondents incurred during the rent discount program. The amount of the jury-found security is approximately $1,000,000. The accounting (accepted by the trial court) sets forth statutory offsets of approximately $1,600,000.

Second, the State Court acknowledged that the equitable right of setoff derived from the English Chancery Courts (App. 6-7). As this Court has held, the "substantive principles of Courts of Chancery remain unaffected." *Stainback v. Mo Hock Ke Lok Po* (1949) 336 U.S. 368, 382, fn. 26 [69 S.Ct. 606]; see, also, *BFP v. Resolution Trust Corp.* (1994) 511 U.S. ___ [128 L.Ed.2d 556, 566-567].

> "Whether the suit be one at law or in equity, setoff must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt,

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[14] The State Court also refused to imply a penalty for noncompliance, because the statute contains a penalty (i.e., for "bad faith") (App. 12). Thus, the question of good faith arose during the Court's interpretation of the statute and not during the Court's consideration of due process, as petitioners suggest (cf. Pet., p. 25, fn. 9).

> the residue only, after such deduction, shall be recovered [citation]."
>
> *Scammon v. Kimball* (1875) 92 U.S. 362, 367 [23 L.Ed. 483, 485].

This equitable right of setoff is protected by California Code of Civil Procedure section 431.70, a rule of procedure which permits a defendant to offset any sum due from plaintiff without the necessity of bringing an independent action and without regard to the statute of limitations (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362; *Hauger v. Gates* (1954) 42 Cal.2d 752, 755).

> "[T]he underlying purpose of [section 431.70] is to prevent a party from sitting on a claim against a particular person and thereby inducing that person to permit his or her counterclaim to become time barred. . . . "
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> *Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 821.

When the Legislature enacted section 1950.5, it codified the reciprocal rights and duties of landlords and tenants. When a landlord provides a tenant the use and enjoyment of his property, the tenant must pay rent and must bear the cost of cleaning and damage caused by the tenant to the leased premises. There is no reason (in law or in equity) why any class member (named or unnamed) should be entitled to step into line for a refund of "security" without offsetting the amount he or she owes respondents for cleaning, repairs, or unpaid rent.[15]

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[15] Petitioners' claim that it would be "unreasonable to make most tenants defend a claim for a few hundred dollars"

Third, the State Court acknowledged the need for flexibility in ruling on issues of setoff (App. 13-14). See, e.g., *Baker v. Gold Seal Liquors, Inc.* (1974) 417 U.S. 467, 475-476 (Stewart, J., dissenting) [94 S.Ct. 2504; 41 L.Ed.2d 243]. The State Court refused petitioners' suggestion that it adopt "hard and fast" rules, and instead remanded the case to the trial court for consideration of the offsets and any equitable defenses thereto.[16]

Fourth, the State Court held that offsets could not be denied simply because of the "practical problems" which might arise in the context of a class action. As this Court has held, a class action right is a "procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper* (1980) 445 U.S. 326, 333

(Pet., p. 26) ignores this basic reciprocity. It also "confuse[s] the means with the ends [and sacrifices] the goal for the going." *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462. Ms. Granberry's rent discount was $100.00; she stipulated to a judgment against her in the sum of $136.00 (JA, v. 4, 1029-1030). The Glasspools' rent discount was $100.00; it cost respondents $243.00 to clean and repair their apartment (Exh. 279). Cosettie Jordan's rent discount was $100.00; she left owing $88.33 in back rent and it cost $161.66 to clean and repair after her (Exh. 278). More than 250 class members moved from respondents' apartments with rents, cleaning costs and damages in excess of $1,000 (Exhs. 278-279).

[16] Having chosen a procedural vehicle for their lawsuit (i.e., the class action) which is grounded in equity and in which the trial court is vested with the broadest discretion (*Richmond v. Dart* (1971) 29 Cal.3d 462, 470, 473-474; *Green v. Obledo* (1981) 29 Cal.3d 126, 148; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821), petitioners should not complain that the issues will be resolved within that equitable, discretionary framework.

[100 S.Ct. 1166; 63 L.Ed.2d 427]. Substantive rights are not forfeited simply because it is not convenient to resolve them.[17]

That is particularly true where the preservation of respondents' substantive right to offsets **accomplishes precisely what the class notice informed the class** – i.e., their "security" would be returned, less statutory claims for unpaid rent, cleaning and repair.

Federal courts permit defensive setoffs in class actions (*Herrmann v. Atlantic Richfield Co.* (1976) 72 F.R.D. 182, 185-186) as well as counterclaims, whether filed at the inception of the case or against absent class members when they come forward to claim their damages (see, e.g., *In re Financial Partners Class Action Litigation* (N.D. Ill. 1984) 597 F.Supp. 686, 688-689; *In re Sugar Industry Antitrust Litigation* (1976) 73 F.R.D. 322, 349 (approving the inclusion of a "brief description of each potential counterclaim" in the original class action notice (*Id.*, at p. 349)); *Weit v. Continental Illinois National Bank and Trust Company of Chicago* (1973) 60 F.R.D. 5, 8).

Therefore, once again, petitioners' specific complaints are unavailing (Pet., pp. 25-27). The State Court did not eliminate any requirement for "notice." Even

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[17] Accordingly, the fact that the amount of damages is invariably an individual question does not defeat class action treatment. *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 905 (cert. den., 429 U.S. 816 [50 L.Ed.2d 75; 97 S.Ct. 57]); *Bing v. Roadway Express, Inc.* (5th Cir. 1973) 485 F.2d 441, 448. Thus, federal courts often utilize the procedure of split trials or a master determines individual damages during the claims process (see, e.g., *Green v. Wolf Corporation* (1968) 406 F.2d 291, 301).

though respondents are not entitled to utilize the "deduct and retain" provisions of section 1950.5, this remains a class action and absent class members will be given notice of any further proceedings in which their individual rights may be determined. Petitioners' claim that it is "unreasonable" to require the class members to defend against equitable offsets (Pet., p. 26), which both this Court and the State Court have recognized as substantive rights which derive from the English Chancery Courts, is the height of sophistry.

V

THERE HAS BEEN NO VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

The separation of powers doctrine (embodied in Art. IV, sec. 4 of the United States Constitution and in Art. III, sec. 3 of the California Constitution), "assigns the resolution of . . . specific controversies to the judicial branch of government." *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1212. One such fundamental assignment to the judiciary involves the interpretation of statutes which the legislature has enacted. *Davis v. Passman* (1979) 442 U.S. 228, 236, fn. 11 [99 S.Ct. 2264; 60 L.Ed.2d 846]; *Lentz v. McMahon* (1989) 49 Cal.3d 393, 402-406.

This case involves the interpretation by the State Court of Civil Code section 1950.5 and the analysis of the interplay between section 1950.5, the equitable right of setoff, and Code of Civil Procedure section 431.70. The separation of powers doctrine is not implicated by that judicial function.

CONCLUSION

If petitioners are dissatisfied with the proceedings in the trial court after remand, and if petitioners have any ground upon which to claim a violation of their federal rights, then they may seek additional review. However, their request for review at this point in the proceedings is an improper plea for an advisory opinion.

For these and for all the reasons set forth herein, the writ should be denied.

Respectfully submitted,

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